IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

No. ~~78~~ 78-242

LESLIE ANDERSON AND
JAMES A. ANDERSON ..... *Petitioners*

v.

UNITED STATES OF AMERICA ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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August 11, 1978

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August 11, 1978

Petitioners, Leslie Anderson and James A. Anderson, respectfully pray that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 21, 1978, and rehearing of which was denied on July 13, 1978.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced in the Appendix hereto. The judgments of conviction in the United States District Court for the Eastern District of Arkansas were entered upon jury verdicts and no opinion was rendered by that court.

JURISDICTION

The judgments of the Circuit Court of Appeals for the Eighth Circuit were entered on June 21, 1978. Timely petitions for rehearing and rehearing *en banc* were denied on July 13, 1978. This petition for writ of certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether an agreement to do an act which neither results in monetary loss to the United States nor demonstrably interferes with the performance of its governmental functions comes within the general conspiracy statute, 18 U.S.C. §371.

2. Whether the coalesing vaguenesses of the conspiracy doctrine and of the judicial definition of fraud, for purposes of 18 U.S.C. §371, have resulted in making criminal an agreement as to which petitioners had no fair warning of the criminality thereof, thus denying them due process of law.

3. Whether in order to be a member of a conspiracy a person must have the requisite specific intent, and, if so, whether he is entitled to a cautionary instruction to this effect.

4. Whether a conviction of conspiracy which is alleged to have included the making of false statements to a government agency must be reversed when it is determined as a matter of law the statements were not false.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

"§371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

. . . ."

STATEMENT OF THE CASE

Petitioner Leslie Anderson is the County Judge of Sharp County, Arkansas. Petitioner James A. Anderson is his son. The office of County Judge in Arkansas is one primarily of an administrative rather than judicial nature.

Under the Federal Aid Road Act, 39 Stat. 355, federal funds were made available for improvement of county roads. The administration of these funds, and supervision of improvements, has been delegated, as regards Arkansas, by the appropriate federal agency to the Arkansas Highway Department. Petitioner Leslie Anderson, as County Judge, submitted a certain road improvement project to the State agency which in turn approved it for financing under the federal program. The county then contracted with the state highway department to make the improvements in accordance with specifications determined by the state agency.

At the time this road improvement project was being performed by Sharp County, it was also the recipient of funds under the Comprehensive Employment and Training Act of 1973 (hereinafter referred to as CETA). Some of the workers whose salaries were reimbursed under that act worked upon the road improvement.

Under the contract between the State Highway Department and the county, the improvements were divided into categories and a specified price was set for the respective units of work. Petitioner James A. Anderson performed certain portions of this contract, and was paid, by the county, at the rate specified in the contract. Petitioners utilized a strawman to conceal the fact James A. Anderson was performing a portion of the contract and was being paid therefor. The work done by Petitioner James A. Anderson

was inspected and certified by the State Highway Department both as to quality and quantity and federal funds were paid upon the basis of the certification.

In performing this work, Petitioner James A. Anderson had the benefit of labor from some of the workers whose salaries were being reimbursed to the county through the CETA program. This Petitioner also did work under other portions of the contract of value equal to the labor, for which he was not paid.

Petitioners were indicted for conspiracy to defraud the United States, in violation of 18 U.S.C. §371, and Petitioner Leslie Anderson was indicted upon four counts of making a false statement to a government agency, 18 U.S.C. §1001. The false statement counts related to invoices for CETA workers on road project and also the submission of these was alleged to be a part of the conspiracy upon which both Petitioners were indicted.

In the United States District Court for the Eastern District of Arkansas, Petitioners were convicted upon all counts by judgment entered on a jury verdict. Appeal was taken to the Court of Appeals for the Eighth Circuit where the convictions of four counts of making false statements were reversed and dismissed and the majority opinion affirmed the conviction of both petitioners upon the conspiracy charge, 18 U.S.C. §371. To review this judgment and opinion Petitioners pray that a writ of certiorari issue.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW AS REGARDS THE SCOPE OF 18 U.S.C. §371 WHICH SHOULD BE DETERMINED BY A DECISION OF THIS COURT.

This case presents a situation where an official of a county, which held a contract to do certain work which was to be federally funded, allowed his son to perform a portion of the work and both took steps to conceal the son's participation as a subcontractor on the project. The son had the benefit of county labor in performing his portion of the contract and the evidence demonstrated that he repaid the county in kind by doing work for which he neither submitted a claim nor was paid. Petitioners submit that any objective view of the record will show that the gravamen of this conviction was the concealment of Petitioner James A. Anderson's role in the performance of the contract.

It is the position of Petitioners that their conduct, and the agreement that may be inferred therefrom, does not amount to a conspiracy to defraud the United States and thus does not come within the ambit of 18 U.S.C. §371. because of the vast number of federally funded programs, Petitioners submit their convictions raise serious questions as to the scope of 18 U.S.C. §371, which should be determined by a definitive decision of this Court. What is at issue here is the extent to which a federally determined sense of business or political morality may be read into the fabric of the federal criminal law under the expansive language defining an offense under 18 U.S.C. §371, developed from *Hyde v. Shine,* 199 U.S. 62 (1905) through *Hammerschmidt v. United States,* 265 U.S. 182 (1924).

Although Petitioners do not take issue with the language of *Hammerschmidt,* as an abstract statement of law, they do suggest that its focus must sometimes be sharpened in the light of the facts of particular cases. Contrary to the holding of the majority opinion of the Court of Appeals, the conduct of the Petitioners neither caused monetary loss to the government nor in any way interfered with any of its functions as is ably demonstrated by the dissenting opinion. See Appendix p. 25 (Henley, J.) To characterize this conduct as coming within the scope of 18 U.S.C. §371 is to subject all transactions as to which any federal funding is involved to federal criminal liability. What is the applicability of 18 U.S.C. §371 to a contractor or subcontractor who fails to pay his creditors? What of a person who, for purposes apart from interfering with a government function, forms a corporation to bid on a project for purpose of preventing his participation from being public?

Petitioners suggest that it is important that there be some definitive delineation of the scope of this statute and their conviction was outside the intended pale of this law. For this reason alone the writ of certiorari should be granted.

2. THE CONSTRUCTION OF 18 U.S.C. §371 IMPLICIT IN THE MAJORITY OPINION OF THE COURT OF APPEALS IS CONTRARY TO THE DECISION OF THIS COURT HOLDING THAT DUE PROCESS OF LAW REQUIRES A FAIR WARNING OF THE CRIMINALITY OF ANY PARTICULAR CONDUCT.

Petitioners submit that their conviction is directly in contravention of the due process requirement of fair warning, *e.g., Palmer v. City of Euclid,* 402 U.S. 544 (1971). What was done by Petitioners neither resulted in detriment to the United States, *i.e.,* it did not increase the cost of the project, nor did it interfere with the accomplishment of the government's objective, *i.e.,* the road was built in accordance with specifications and the unemployed were given jobs under the CETA program. There is no proof that Petitioner's dealings violated any state or local law or regulation. Petitioners made no misrepresentation to the government agencies involved. For purposes which do not appear in the record, Petitioners concealed James A. Anderson's relationship to the work being done. Since Leslie Anderson is an elected official, there are obvious reasons for this concealment unrelated to any thought of the federal government. It is submitted that Petitioners had no fair warning that this arrangement would be construed as defrauding the government and therefore their conviction violates due process.

This Court has repeatedly held that a statute which, by reason of vagueness fails to fairly warn, what conduct is proscribed is void, *e.g., United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921). Those same constitutional values should preclude such an expansive definition of the conspiracy to defraud concepts so as to ensnare within the

federal criminal net that as to which the participants were not fairly warned as to its criminality. *United States v. Harriss,* 347 U.S. 612 (1954). When the scope of the conspiracy statute, 18 U.S.C. §371, is delineated in accordance with the fair warning requirement, and with reference to the facts of this case, see *United States v. Mazurie,* 419 U.S. 544 (1975), it is submitted that conduct upon which Petitioners' convictions are based will be beyond the permissible statutory scope.

Because of this conflict with the due process fair warning requirement, the writ of certorari should issue to review the opinion below.

3. THE OPINION OF THE COURT OF APPEALS AS REGARDS PETITIONER JAMES A. ANDERSON IS IN CONFLICT WITH CONTROLLING PRECEDENTS OF THIS COURT.

As regards Petitioner James A. Anderson, the opinion of the Eighth Circuit is in clear conflict with this Court's opinion in *Ingram v. United States*, 360 U.S. 672 (1959). In *Ingram* it was held that employees of persons charged with conspiring to evade payment of taxes, although participants in the scheme were not criminally liable absent proof they knew that one of the objectives of the plan was to evade a tax liability. Translated to this case, *Ingram* means James A. Anderson could be a culpable conspirator only if the evidence shows he knew that a federal program or funds were involved or affected by the conspiracy. There is not any evidence in the record that Petitioner James A. Anderson knew of the source of funding for the road job, nor the fact that county laborers who assisted him were paid through the CETA programs.

Absent any knowledge of the federal participation in the programs, the requisite element of willfulness, *United States v. Falcone*, 311 U.S. 205 (1940), is absent. Furthermore this deficiency of proof cannot be supplied by the compounding of inferences. *Direct Sales Co. v. United States*, 319 U.S. 703 (1943).

Irrespective of the Court's determination upon the other points presented, it is clear that the writ of certiorari should issue as regards James A. Anderson because of the manifest conflict of opinion below and the foregoing controlling precedents of this Court.

4. THE OPINION BELOW IS IN CONFLICT IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL AS REGARDS DEFENDANT'S CAUTIONARY INSTRUCTION.

Because there were other possible objects of the concealment other than defrauding the United States, and which would not constitute a violation of 18 U.S.C. §371, see *Ingram v. United States, supra*, Petitioners requested the following cautionary instruction:

> "The defendants are charged in Count I with conspiring to defraud the United States. In connection with this charge, the prosecution has the burden of proving beyond a reasonable doubt that the object of the conspiracy was to deceive or cheat the United States. Proof of an intent to defraud some other person or government would not be sufficient for a conviction on this charge and should not be considered by you.
>
> If, therefore, the jury does not find beyond a reasonable doubt that the defendants knowingly and willingly conspired together with the specific purpose of defrauding the United States, then you should acquit the defendants on this charge."

(Transcript pp. 579-80)

This instruction was refused by the District Court and the Court of Appeals held that this point was adequately covered by other instructions. Appendix p. 16 n. 2. Petitioners respectfully take exception to this holding and submit that the Court of Appeals' opinion is, on this point, in conflict in principle with precedents of this Court, *United States v. Guest*, 383 U.S. 745, 760 (1966), and of other

Circuits, *United States v. Gillilan,* 288 F.2d 796 (2d Cir. 1961); *Sears v. United States,* 343 F.2d 139 (5th Cir. 1965).

Every criminal conspiracy is not proscribed by 18 U.S.C. §371; only those for the specific purposes enumerated in the statute. Under the principle of *United States v. Guest, supra,* the Petitioners were entitled to instructions specifically delineating the offense. In view of the possible multiple objects of any agreement between Petitioners, some of which would not come within the perview of the statute, Petitioners were entitled to the instruction expressly excluding the non-federal objectives as a basis for conviction. See *United States v. Vilhott,* 452 F.2d 1186 (2d Cir. 1971).

This error was accentuated by the failure to reverse the conspiracy convictions upon reversal of the false statement counts. By both the indictment and proof, the alleged false statements inextricably intertwined in the alleged conspiracy. That the jury's deliberations upon the one were materially influenced by its finding of guilt on the other is more than an imaginary possibility, particularly in the absence of the requested cautionary instruction. The possibility of such spill-over effect of itself should have required reversal of the conspiracy conviction. *Cf. United States v. DeCaavalconte,* 440 F.2d 1264 (3d Cir. 1971).

In order that the failure to require the requested cautionary instruction, and the effect of false statement convictions upon the conspiracy count may be fully reviewed, a writ of certiorari should be granted.

CONCLUSION

As has been eloquently demonstrated by a concurring opinion of this Court, the doctrine of conspiracy, which has its roots in the Court of the Star Chamber, is imbued with substantial threats to many of our values, *Krutewitch v. United States,* 336 U.S. 440, 445 (1949) (Jackson, J., concurring). This danger is particularly acute where, as here, the "elastic, sprawling and pervasive offense", *Id.,* coalesces with the indefinite concept of fraud, which comes from *Hammerschmidt v. United States, supra* and its progeny. Due process, particularly its mandate of fair warning, requires that there be a definitive delineation of the scope of the conspiracy to defraud statute, and certiorari should be granted in this case to the end that such limits may be found. Petitioners submit that when this offense is defined, the federal crime with which they are charged will be neither federal, nor criminal.

Furthermore the conviction of Petitioner James A. Anderson is clearly in conflict with the decisions of this Court which require that each defendant be proved to have the knowledge necessary to the formation of the requisite intent.

In addition the District Court's refusal to give the requested cautionary instruction, coupled with the erroneous submission of the four false statement counts, created reversible error. By its failure to reverse the Court of Appeals' opinion is in conflict in principle with decisions

of this Court as well as those of other circuits. In order that this may be corrected a writ of certiorari should issue.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 77-1647 and 77-1648

No. 77-1647

UNITED STATES OF AMERICA, *Appellee* v. LESLIE ANDERSON, *Appellant*	Appeal from the United States District Court for the Eastern District of Arkansas.

No. 77-1648

UNITED STATES OF AMERICA, *Appellee* v. JAMES A. ANDERSON, *Appellant*	Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: December 12, 1977
Filed: June 21, 1978

Before LAY, BRIGHT and HENLEY, Circuit Judges.

LAY, Circuit Judge.

Defendants Leslie Anderson and James A. Anderson were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. §371, after a jury trial in the United States District Court for the Eastern District of Arkansas. In addition, Leslie Anderson was convicted on four counts charging that he made a false or fraudulent statement in a matter within the jurisdiction of a federal agency in violation of 18 U.S.C. §1001. Both defendants were fined and sentenced to terms of imprisonment.[1]

On appeal the defendants challenge the validity of their convictions on the conspiracy charge, asserting that the evidence was insufficient to establish that they engaged in a conspiracy to defraud the United States.[2] Leslie Anderson also challenges the sufficiency of the evidence on the false statement charges. We affirm the convictions on Count I. We reverse Leslie Anderson's conviction on Counts II-V,

[1]Leslie Anderson was sentenced to imprisonment for two years on the indictment as a whole. James Anderson received a sentence of two years, with six months to be served in a jail-type institution and the balance to be spent on probation.

[2]The defendants also argue that (1) the district court erred in refusing to grant defendants' motion to strike certain alleged surplusage in the indictment; (2) the district court erred in admitting evidence relating to those parts of the indictment alleged to be surplusage; and (3) the district court erred in instructing the jury. We have examined each of these contentions and find them to be without substantial merit. The allegations which the defendants attack as surplusage were relevant to the conspiracy charge and were not inflammatory or prejudicial. We therefore decline to disturb the trial court's denial of the defendants' motion to strike the allegations. See **Dranow v. United States**, 307 F.2d 545, 558 (8th Cir. 1962). Since the allegations were properly included in the indictment, admission of evidence in support of the allegations was proper.

The defendants urge that the trial court erred in refusing to specifically instruct the jury that if they found a conspiracy existed but was intended to defraud some entity other than the federal government, a verdict of not guilty was required. We have examined the charge as a whole and find that it adequately instructed the jury.

and remand the cause for resentencing of defendant Leslie Anderson.

The events which gave rise to the charges against the defendants involved two federally funded road construction projects in Sharp County, Arkansas. Defendant Leslie Anderson was the County Judge of Sharp County during the period of time alleged in the indictment, and as such he was a general financial officer of the county. In 1975 Judge Anderson obtained approval for two contracts relating to a project for paving and other improvements on the Grange Road, a county road between Arkansas Highway 230 and Arkansas Highway 115 in Sharp County. Both contracts were approved under a program administered through the Federal Highway Administration and the Arkansas State Highway Department whereby federal funds are used to pay 70 percent of the total cost, including labor and materials, of a project and state or local funds pay the remaining 30 percent of the total cost.

In a typical situation, the Arkansas State Highway Department works with the county in preparing a proposed plan for a road construction project. If the proposal is approved by the Federal Highway Administration, state representatives and county personnel then develop detailed plans and specifications for the job, including itemized estimates of the cost of each phase of the project. If these plans and specifications are approved by the federal agency, federal funds are earmarked for the project and a contract is executed which commits such funds in the amount of 70 percent of the total estimated cost. In the present case, Sharp County was to perform the construction work and furnish all labor and materials necessary for completion of the Grange Road project.

The first contract for improvements on the Grange Road was executed on March 4, 1975. Included in the total project cost was an estimate for labor and materials for fencing work in the amount of $31,118.00. Work began pursuant to the contract in April of 1975. Defendant James A. Anderson, Judge Leslie Anderson's son, performed the fencing work specified in the contract during May and June of 1975. At the direction of Judge Anderson, a number of county workers employed under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. §801 et seq., performed labor for James A. Anderson on the fencing portion of the project.

Under the CETA program, Sharp County was authorized to hire a number of employees for work in the public sector. The county paid the workers' wages but was subsequently reimbursed in full by the United States Department of Labor through a system administered by the Arkansas Manpower Council. Judge Anderson submitted reimbursement invoices to the state office in June and July for work performed in May and June, respectively. The invoices listed wages paid by the county to a number of CETA employees, including those workers who had performed labor for James A. Anderson on the fencing project.

James A. Anderson purchased materials for the fencing work in April or early May. Acting as a straw man for James A. Anderson, a friend of both of the defendants named G. A. Perrin submitted the only bid on the job on June 6, 1975, the day after James A. Anderson had completed the work. The bid was in the amount of $32,000.00, whereas the amount the highway department contract allowed was $31,118.00.

In July of 1975, Perrin submitted a false claim against Sharp County in the amount of $31,118.00 for the fencing work performed on the first Grange Road contract. The claim included the cost of labor which had been furnished to James A. Anderson under the CETA program at no cost to him. This claim was honored by Judge Anderson and paid by the county, which was eventually reimbursed for 70 percent of the claim with federal funds committed to the Grange Road project.

A similar sequence of events took place with regard to the second contract, executed on June 30, 1975. Again James A. Anderson performed the fencing work with the aid of CETA employees of Sharp County and through Perrin, the straw man, obtained compensation for the full contract estimate, including the cost of the labor rendered by the CETA employees.

Thus, although James A. Anderson was able to complete the fencing work using "free" labor, he was able to collect payment based on the estimated cost for labor and materials submitted in the plans and specifications approved by the Federal Highway Administration. Furthermore, although CETA workers were to be used by the county in jobs in the public sector, at the direction of Judge Anderson some CETA workers employed by Sharp County were actually performing duties for the benefit of James A. Anderson. This situation formed the basis of the conspiracy charged in Count I of the indictment.

Conspiracy Charge.

The defendants argue that the evidence introduced at trial was insufficient to establish an agreement between them, and further that if any agreement did exist its object and effect was not to defraud the United States. We are

satisfied that the evidence, taken in the light most favorable to the government and drawing all inferences in support of the jury verdict, was sufficient to establish an agreement between the defendants to defraud some governmental entity. See *Glasser v. United States,* 315 U.S. 60 (1942). We also believe that the jury was warranted in concluding that the scheme carried out by the defendants had the intended effect of defrauding the federal government.

The defendants assert that since no regulation prohibited the use of CETA employees on county projects receiving other types of federal funding, and since the Federal Highway Administration had obligated itself to pay the amounts submitted by James A. Anderson in his claims for fencing work, no agency of the federal government was defrauded. In essence, defendants' argument is that the federal government did not pay out any more money than it was legally obligated to pay; that the "double dipping" by the Andersons was a fraud against Sharp County but not the United States. We disagree.

It is clear that a conspiracy to "defraud the United States" within the meaning of 18 U.S.C. §371 need not result in a monetary loss to the federal government.

> To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the over-

> reaching of those charged with carrying out the governmental intention.

Hammerschmidt v. United States, 265 U.S. 182, 188 (1924). See also *Dennis v. United States,* 384 U.S. 855, 861 (1966).

As a result of the inflated claim submitted to Sharp County by James A. Anderson, the federal government paid 70 percent of the overstated cost of the fencing work. Assuming, as the defendants contend, the county could make up its 30 percent contribution with labor including that of CETA employees, the obvious plan was not to save the county money, but to afford a means of concealing the payment of false labor costs to James A. Anderson. Even though the Federal Highway Administration spent no more than originally contemplated according to the estimates contained in the contract, the defendants' actions nonetheless interfered with the government's interest in "seeing that the entire project [was] administered honestly and efficiently and without corruption and waste." *United States v. Hay,* 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied,* 425 U.S. 935 (1976). See *Harney v. United States,* 306 F.2d 523, 527 (1st Cir.), *cert. denied,* 371 U.S. 911 (1962). See also *United States v. Thompson,* 366 F.2d 167, 170-73 (6th Cir.), *cert. denied,* 385 U.S. 973 (1966); *Wagner v. United States,* 263 F.2d 877, 880 (5th Cir. 1959); *United States v. Weinberg,* 226 F.2d 161, 165-67 (3d Cir. 1955), *cert. denied,* 350 U.S. 933 (1956).

In addition to the effect of the defendants' activities on the highway program, the use of CETA employees for the sole benefit of James A. Anderson on his fencing "subcontract" thwarted the intended purpose of the CETA program, which is to provide additional funding for jobs in the public sector. As the evidence at trial indicated, the CETA

employees involved in this case were to be used in public, not private, employment.[3] Thus, the defendants' scheme to misuse CETA employees to provide "free" labor to the advantage of James A. Anderson also supported the charge of conspiracy to defraud the United States. See *United States v. Holt*, 108 F.2d 365 (7th Cir.), *cert. denied*, 309 U.S. 672 (1940).

False Statement Charges.

The false statement charges upon which defendant Leslie Anderson was convicted were based on the four reimbursement invoices signed by him and submitted to the Arkansas Manpower Council in June and July, 1975 so that Sharp County could receive federal funds as reimbursement for wages paid to CETA employees, including those CETA employees assigned to work for James A. Anderson on the fencing project. Each reimbursement invoice contained the following certification:

> I CERTIFY THAT (a) the State of Arkansas-CETA, Office of the Governor has not been billed for the services covered by this invoice; (b) funds have not been received from the State or expended for such services under any other contract agreement or grant; (c) the amount(s) claimed by this invoice constitute(s) allowable costs/expenditures under the terms of the contract agreement or grant; (d) all amounts for federal income, unemployment, and FICA taxes due through the end of the preceding quarter have been paid.

[3]Defense witness Jo Jackson, a former director of the Arkansas Manpower Council, testified that CETA employees could be used like any other county employee "so long as it was in a public sector." She further stated that use of CETA employees on private projects was prohibited. The regulations governing Title II CETA grants state:

> Funds provided under Title II which are used for public service employment shall only be used to fund public service needs which have not been met and to implement new public services. . . .

29 C.F.R. §96.23(a).

The government contends that, since federal highway funds irrevocably committed to the Grange Road project included an allocation for the services performed by CETA workers on the fencing job, clause (b) of the certification was false and by submitting the reimbursement invoices Judge Anderson violated 18 U.S.C. §1001.[4]

Judge Anderson asserts that the evidence adduced at trial failed to establish that clause (b) of the certification was false. We find the clause to be ambiguous. A reasonable interpretation of the terms "received" and "expended" could be that other federal funds have actually been paid out or actually received by the county for the work done. In the present case the federal funds had only been committed to the project but were still held by the Arkansas State Highway Department. Furthermore, in the context of the overall application the meaning of the phrase "any other contract agreement or grant" is somewhat unclear. A reasonable construction of the phrase would be that no prior CETA funds have been expended, rather than that no funds from some other unrelated federal grant have been expended. Under the government's theory every application for

[4]Title 18 U.S.C. §1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

reimbursement for use of CETA employees on highway projects where there was any use of federal funds would be subject to a false statement charge under 18 U.S.C.A. §1001. We cannot agree.

In light of these ambiguities, under Counts II-V of the indictment, it was incumbent upon the government to introduce proof sufficient to establish the falsity of the statements as well as the defendant's knowing and willful submission of the statements. In carrying out that burden the government must negative any reasonable interpretation that would make the defendant's statement factually correct. See *United States v. Steinhilber,* 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo,* 320 F.2d 898, 907 (2d Cir. 1963). Our review of the record compels us to find that the government failed to clarify the facial ambiguities in the certification clause, and therefore failed to establish that Leslie Anderson willfully submitted the reimbursement invoices knowing the certifications to be false. We thus reverse Judge Anderson's conviction on Counts II-V.

Sentencing.

Although defendant Leslie Anderson was convicted on five separate counts, the trial court imposed a general sentence of two years on the indictment as a whole. We have recognized the difficulties which arise from the imposition of a general unapportioned sentence. *Peoples v. United States,* 412 F.2d 5, 7 (8th Cir. 1969). In view of the fact that we reverse four of the five counts upon which the general sentence imposed here was based, we remand Case No. 77-1647 so that defendant Leslie Anderson may be resentenced on Count I. *Cf. United States v. Moynagh,* 556 F. 2d 799, 805 (1st Cir. 1977).

The judgment in Case No. 77-1648 is affirmed. The judgment in Case No. 77-1647 is affirmed in part, reversed in part and remanded.

HENLEY, Circuit Judge, concurring in part and dissenting in part.

I concur with the majority in its decision that the conviction of the defendant, Leslie Anderson, on the substantive counts of the indictment should be reversed and that a judgment of acquittal on those counts should be entered. I also agree in the circumstances Judge Anderson should be resentenced on Count I assuming that his conviction on that count is to be upheld.

However, in my opinion the conviction of both defendants on Count I should be reversed and judgments of acquittal on that count should be entered. For that reason I respectfully dissent from the majority's decision with respect to the count in question.

I think that the jury was fully justified in finding that the defendants conspired to defraud Sharp County, that the result of their conspiracy was to inflict some financial loss on the county and to require the federal government ultimately and indirectly to pay twice for some of the same work that the CETA employees performed on the Grange Road project.

But, as far as Count I is concerned, the question is not whether Judge Anderson and his son, and perhaps others, conspired to defraud the county or whether or to what extent their plan succeeded. The question is whether they conspired to defraud the United States or any of its agencies in violation of 18 U.S.C. §371.

I recognize that the concept of "fraud against the government" has been defined broadly in cases arising under §371. Such a conspiracy is not limited to schemes to cheat the government or its agencies out of their money or property. As the majority opinion correctly recognizes, the government is defrauded in legal contemplation if federal programs or functions are knowingly interfered with, subverted or obstructed. *See* the cases cited in the majority opinion.

The opinion of the court characterizes the alleged conspiracy as having been one to divert county funds to James Anderson in the manner described in the court's opinion and with the ultimate impact on the federal agencies that has been mentioned. And, the majority says that such a scheme would necessarily interfere with the government's interest in seeing its road aid program (the 70-30 program) and its public employment program (CETA) administered honestly and efficiently and without corruption and waste and was, therefore, a conspiracy to "defraud" the Transportation Department and the Labor Department.

Conceding arguendo that the conspiracy postulated by the majority would be a conspiracy to defraud the United States and its agencies, that conspiracy in my view is not the one charged in the indictment and is not the one that the government undertook to prove at the trial.

The thrust of the conspiracy charge against the Andersons was not that the CETA employees of the county had been assigned to a project that had been subcontracted to a private party, but, on the other hand, was that the employees in question were assigned to work on a road project that ultimately and indirectly would be paid for to the extent of 70% with federal funds disbursed by the Department of Transportation to reimburse the Arkansas State Highway Department for funds that it had paid over to the county on approved estimates as the work progressed.

Under the government's theory, at least one of the two federal agencies would have been defrauded even if the fencing work on the Grange Road had not been subcontracted at all. In other words, under that theory the government would have been defrauded automatically and the county unjustly enriched by the mere assignment of CETA employees to a project that ultimately was being funded in whole or in part with federal money from another source. However, the government has cited nothing by way of authority to sustain such a fraud per se theory.

The assignment of CETA personnel to the Grange Road project did not cost the government any money that it would not have spent anyway. Nor did the assignment interfere with or obstruct either the CETA program or the road aid program. The purpose of the former program was to give work to people who needed it; the purpose of the latter program was to enable counties to build roads; when the CETA employees were assigned to the Grange Road project, both of the federal agencies involved got exactly what they had bargained for.

As stated, I would reverse the conviction of both defendants on Count I as well as the conviction of Judge Leslie Anderson on Counts II-V.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 78-242

In the Supreme Court of the United States

OCTOBER TERM, 1978

LESLIE ANDERSON AND JAMES A. ANDERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 15-27) is reported at 579 F. 2d 455.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1978. A petition for rehearing was denied on July 13, 1978. The petition for a writ of certiorari was filed on August 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to engage in conduct that obstructs the lawful functions of federal agencies

constitutes a conspiracy to defraud the United States, in violation of 18 U.S.C. 371.

2. Whether, in the circumstances of this case, reversal of petitioner Leslie Anderson's convictions on four counts of making false statements in violation of 18 U.S.C. 1001 required the reversal of petitioners' convictions of conspiracy to defraud the United States.

3. Whether the evidence was sufficient to warrant a jury in finding that petitioner James Anderson conspired to engage in conduct that had the intended effect of defrauding the United States and, if not, whether his conviction of violating 18 U.S.C. 371 may be sustained on evidence showing that he knowingly conspired to defraud a governmental entity and that the United States necessarily would be harmed thereby.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioners were convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371. Petitioner Leslie Anderson was also convicted on four counts of making false or fraudulent statements, in violation of 18 U.S.C. 1001. Petitioner James Anderson was sentenced to two years' imprisonment, with six months to be served in a jail-type institution and the remainder to be served on probation. Petitioner Leslie Anderson was sentenced to two years' imprisonment. The court of appeals affirmed the convictions on the conspiracy count (Judge Henley dissenting) but reversed the convictions on the false statement counts (Pet. App. 15-27).[1]

Briefly, the evidence showed that petitioners engaged in a scheme whereby laborers whose salaries were paid under the Comprehensive Employment and Training Act of 1973 (CETA), 29 U.S.C. 801 *et seq.*, worked for petitioner James Anderson, at the direction of his father, petitioner Leslie Anderson, on two highway fencing projects. These projects received 70% of their funding from the federal government through a program administered by the Federal Highway Administration. Through petitioners' unlawful conduct, the federal government, in effect, paid for the cost of this labor twice, to the benefit of petitioner James Anderson, and the lawful functioning of both federal programs was obstructed.

As County Judge and general financial officer of Sharp County, Arkansas, petitioner Leslie Anderson obtained approval from the Arkansas Highway Department for two contracts relating to a road improvement project in the county. Both contracts were approved under a program administered by the Federal Highway Administration through the state highway department (Tr. 36-37). Under this program, the federal government pays 70% of the total cost, including labor and materials, of approved highway improvement projects, and the State or county finances the remainder (Tr. 49, 236-241).

The first contract, executed on March 4, 1975, provided for fencing work on a county road improvement project for a total projected cost of $31,118 (Tr. 37, 209). During

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[1]Although petitioner Leslie Anderson was convicted on five separate counts, the trial court simply imposed a general sentence. Because it reversed four of the five counts upon which the general sentence was imposed, the court of appeals remanded petitioner Leslie Anderson's case for resentencing on the conspiracy count (Pet. App. 24).

May and June 1975, petitioner James Anderson performed the fencing work specified in the contract (Tr. 135-136). At the direction of Judge Anderson, several county CETA workers assisted petitioner James Anderson on the fencing project, and the salaries of these employees were eventually paid by the federal government through the CETA program administered by the Arkansas Manpower Council (Tr. 256-259, 333, 354, 363, 374-375).

On June 6, 1975, the day after petitioner James Anderson had completed the work, G.A. Perrin, a friend of both petitioners, submitted the only bid on the above fencing project, a bid in the amount of $32,000 (Tr. 97, 109, 135-136). The next month, Perrin filed a claim with the county in the amount of $31,118 for the fencing work (Tr. 183). Judge Anderson approved the claim, and the county issued a check payable to Perrin for $31,118 (Tr. 183-184, 195, 197-198). Petitioner James Anderson used the proceeds of this check to purchase a certificate of deposit, to deposit money into his wife's checking account and to pay off a personal loan (Tr. 438-443).[2]

The same pattern of conduct occurred with respect to the second road improvement contract. Petitioner James Anderson performed the fencing work with the aid of CETA employees of Sharp County and through Perrin obtained compensation for the full contract estimate, $16,200, including allowable labor costs (Tr. 111, 126-127). Again, CETA employees were used on the job (Tr.

[2]After the check was issued, petitioner James Anderson took it to Perrin's place of business and persuaded his business associate, James Rose, to place a stamped endorsement, "[f]or deposit * * * Perrin & Rose Farm Supply, by G.A. Perrin," on the check (Tr. 200-201). Without any further endorsements, Anderson negotiated the check at a local bank (Tr. 438-443).

135-136). As before, petitioner James Anderson used the proceeds of the check to purchase a certificate of deposit, to deposit money into his and his wife's checking accounts, and to pay off a personal loan (Tr. 426-428).

ARGUMENT

Petitioners concede (Pet. 4) that federal funds were expended on the road improvement project submitted to the state agency by Judge Anderson, that workers whose salaries were reimbursed under CETA worked on the fencing portion of the road project, and that a straw man was used to conceal petitioner James Anderson's performance of the fencing portion of the contracts and receipt of payment for that work. Petitioners contend, however (Pet. 6-7), that this conduct does not constitute a conspiracy to defraud the United States because the cost of the road improvement project to the federal government was not thereby increased and because unemployed persons were given employment under the CETA program, as contemplated by that statute. They also attack the application of 18 U.S.C. 371 to this conduct on due process grounds (Pet. 8-9). Petitioners further contend (Pet. 2, 12) that the court of appeals erred in failing to reverse their conspiracy convictions once it had reversed petitioner Leslie Anderson's convictions of making false statements in violation of 18 U.S.C. 1001. Petitioner James Anderson additionally contends (Pet. 10) that, even assuming he had agreed to participate in a fraudulent scheme to charge a government entity for the labor of government-paid workers, he cannot properly be convicted under 18 U.S.C. 371 because the evidence did not show that he knew that *federal* funds or programs would be affected by the scheme. These claims are insubstantial.

1. The general conspiracy statute, 18 U.S.C. 371, reaches " 'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.' " *Dennis* v. *United States,* 384 U.S. 855, 861 (1966) quoting *Haas* v. *Henkel,* 216 U.S. 462, 479 (1910). Accord: *United States* v. *Johnson,* 383 U.S. 169, 172 (1966). Although conspiracy to defraud the United States "means primarily to cheat the Government out of property or money, * * * it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Hammerschmidt* v. *United States,* 265 U.S. 182, 188 (1924). It is thus unneccessary under the statute for the government to suffer an actual monetary loss. *United States* v. *Johnson, supra,* 383 U.S. at 172; *Hammerschmidt* v. *United States, supra,* 265 U.S. at 188; *United States* v. *Del Toro,* 513 F. 2d 656, 663-664 (2d Cir.), cert. denied, 423 U.S. 826 (1975); *United States* v. *Smith,* 496 F. 2d 185, 189 (10th Cir.), cert. denied, 419 U.S. 964 (1974); *United States* v. *Thompson,* 366 F. 2d 167, 170-173 (6th Cir.), cert. denied, 385 U.S. 973 (1966).

In the present case, petitioner James Anderson and his father conspired in a scheme that permitted James Anderson to use government-paid labor in performing fencing contracts on the road improvement project and still be paid a full contract price including labor costs. As the majority below properly found (Pet. App. 21; citations omitted), this conduct "interfered with the [federal] government's interest in 'seeing that the [road improvement] project [was] administered honestly and efficiently and without corruption and waste' ", since the federal government, through the federally-financed road improvement program, eventually paid 70% of that overstated labor cost. At the same time, this scheme thwarted the purpose and

proper functioning of the CETA program. That program was established, as the court of appeals observed (Pet. App. 21), "to provide additional funding for jobs in the public sector," and it was implemented by regulations expressly prohibiting the employment of CETA employees "in building and highway construction work * * * and [in] other work which inures primarily to the benefit of a private profit-making organization." 29 C.F.R. 96.23(b)(10).[3] By conspiring to engage in conduct that resulted in placing CETA workers in jobs that were part of a contract held by and benefiting a private-sector employer, petitioners thwarted the purpose of creating public sector jobs that would otherwise not have existed.[4]

The gravamen of petitioners' claim (Pet. 8-9) that their due process rights were violated by the application of 18 U.S.C. 371 to their conduct is not entirely clear. If they are contending that they had no "fair warning" (Pet. 9) that their conduct would constitute a conspiracy to defraud, then their claim is without merit because the jury was instructed that to convict on the conspiracy count, it had to find that petitioners "willfully" participated in the scheme "with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done" (Tr. 598-599). If petitioners are claiming that they had no fair warning that their fraudulent scheme would harm

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[3]This section remained unchanged during the period applicable in this case except that the subsection was redesignated. See 29 C.F.R. 96.23(b)(7) (1974).

[4]We disagree with the dissenting opinion below (Pet. App. 25-27) that the conspiracy charged was that the county and not a private third party was unjustly enriched by the assignment of CETA employees. The indictment charged, and the government proved at trial, that petitioner James Anderson received payments for non-existent labor costs because of the assignment of the CETA employees to work on the two fencing contracts (Count I of indictment, paras. II-IX; Tr. 589-591).

the United States and thus be punishable under 18 U.S.C. 371, then they are merely repeating the claim made by petitioner James Anderson (Pet. 10), which we answer below (pages 8-11).

2. Petitioners' claim that the reversal of petitioner Leslie Anderson's convictions on the separate counts of making false statements in violation of 18 U.S.C. 1001 requires reversal of their conspiracy convictions is based on the erroneous premise that "the alleged false statements" were "inextricably intertwined in the alleged conspiracy" (Pet. 12). The alleged false statements were certifications made on CETA reimbursement invoices by petitioner Leslie Anderson stating, *inter alia,* that no funds had been "expended" for the services of the CETA workers "under the terms of the contract agreement or grant" (Tr. 252-253). The court of appeals held that the convictions under 18 U.S.C. 1001 could not stand because the language of the required certifications was ambiguous; the court noted that, for example, the term "expended" could be interpreted as not applying to funds, like the federal highway funds, that were only "committed" at the time Leslie Anderson signed the certifications (Pet. App. 23-24). This holding obviously does not touch on the "essential nature" of the conspiracy (see *Blumenthal* v. *United States,* 332 U.S. 539, 557 (1947)), which, as noted, was to permit petitioner James Anderson to use the services of government-paid workers on the fencing contracts without paying them himself and then to receive compensation from the government for full contract costs, including labor costs not actually incurred.

3. With respect to the claim, now made only by petitioner James Anderson, that the evidence was insufficient to show an agreement to defraud the United States, as opposed to an agreement to defraud government programs not known to be federal programs, the court of appeals concluded (Pet.

App. 20) that the evidence "was sufficient to establish an agreement between the defendants to defraud some governmental entity" and that "the jury was warranted in concluding that the scheme carried out by the defendants had the intended effect of defrauding the federal government." This essentially factual determination does not warrant further review.

Even assuming, however, that the evidence was insufficient to establish that petitioner James Anderson knew that the fraudulent scheme to which he agreed would affect federal programs, his conviction under 18 U.S.C. 371 may properly stand. An agreement to defraud governmental entities other than the federal government comes within the conspiracy-to-defraud clause of 18 U.S.C. 371 where the conduct agreed upon would, if carried to completion, obstruct the proper functioning of federal programs. *Harney* v. *United States,* 306 F. 2d 523 (1st Cir.), cert. denied, 371 U.S. 911 (1962) (conspiracy to defraud Commonwealth of Massachusetts with respect to the valuation of land taken by the Commonwealth for a highway that would receive 90% of its funding from the federal government); cf. *United States* v. *Lentz,* 524 F. 2d 69, 71 (5th Cir. 1975); *United States* v. *Sabatino,* 485 F. 2d 540, 544 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974).[5]

This construction of the conspiracy-to-defraud clause of 18 U.S.C. 371 is, moreover, consistent with this Court's reasoning in *United States* v. *Feola,* 420 U.S. 671 (1975),

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[5]In *Lentz* and in *Sabatino*, the courts found that the submission to a bank of a loan application containing false statements, without knowledge that the bank was insured by the Federal Deposit Insurance Corporation, was sufficient to constitute an offense under 18 U.S.C. 1014, which makes it unlawful to "knowingly" make a false statement for the purpose of influencing institutions insured by the FDIC.

with respect to the second clause of the statute, concerning conspiracies to commit an offense against the United States. The statute at issue in *Feola* was 18 U.S.C. 111, making it a crime to assault a federal officer engaged in the performance of his official duties. The Court held that 18 U.S.C. 111 required only "an intent to assault, not an intent to assault a federal officer" (420 U.S. at 684). With respect to 18 U.S.C. 371 the Court rejected both the general contention that the "conspiracy statute embodied a requirement of specific intent to violate federal law" (420 U.S. at 688) and the specific contention that a conspiracy to assault a federal officer could not be established without proof that the defendants knew the federal identity of the victim (*id.* at 692-693). The Court observed that assault was a type of conduct that would be wrongful without regard to the identity of the victim (*ibid.*) and that, accordingly, an agreement to assault persons who were, in fact, federal officers could not reasonably be treated as "less blameworthy" or "less of a danger to society solely because the participants are unaware which body of law they intend to violate" (*id.* at 694).

Here, the essential conduct—fraud—in which petitioners agreed to engage is clearly wrongful without regard to whether petitioners were defrauding the county, the State, or the United States.[6] The fact that the scheme on which

[6]Because petitioner James Anderson does not dispute the court of appeals' finding (Pet. App. 20) that he intended to defraud "some governmental entity," his position is not supported by *Ingram* v. *United States*, 360 U.S. 672 (1959), which held only that a person could not be convicted of conspiracy to evade the payment of taxes unless it were shown that he knew taxes were due (*id.* at 677-680). His citation (Pet. 10) of *United States* v. *Falcone*, 311 U.S. 205 (1940), is similarly inapposite, for as this Court noted in *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709 (1943), *Falcone* "comes down merely to this, that one does not become a party to a conspiracy [to violate the Harrison Narcotic Act] by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally."

they agreed would result in harm to the United States does, however, satisfy the jurisdictional requirement, in that it ties petitioners' conduct to the pertinent "area of federal concern" (*United States* v. *Feola, supra,* 420 U.S. at 695).[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

[7]Because the petition's statement of the scienter requirement of the offense at issue here is incorrect, petitioners' contention (Pet. 11-12) that the jury should have been instructed to acquit if only a specific intent to defraud "some * * * person or government" other than the United States were shown is also erroneous. *United States* v. *Guest*, 383 U.S. 745 (1966), does not support petitioners' position, for there the Court held only that, under the civil rights conspiracy statute, 18 U.S.C. 241, a specific intent to interfere with the federal right of interstate travel had to be shown, not that the jury had to find that the defendants knew interstate travel to be a federal right. Petitioners' citation of *United States* v. *Vilhotti*, 452 F. 2d 1186 (2d Cir. 1971), is unavailing because it relies on the holding in *United States* v. *Crimmins*, 123 F. 2d 271 (2d Cir. 1941), disapproved by this Court in *United States* v. *Feola, supra,* 420 U.S. at 688-692.

DOJ-1978-10